

Neutral Citation No. - 2024:AHC-LKO:26712

A.F.R.

Judgment Reserved on : 20.03.2024

Judgment Delivered on : 01.04.2024

Court No. - 19

Case :- APPLICATION U/S 482 No. - 2399 of 2024

Applicant :- Jamin And Another

Opposite Party :- State Of U.P. Thru. Prin. Secy. Home Lko. And Another

Counsel for Applicant :- Sheikh Wali Uz Zaman

Counsel for Opposite Party :- G.A.

Hon'ble Subhash Vidyarthi J.

1. Heard Sri Sheikh Wali Uz Zaman, the learned counsel for the applicants and Sri Gyanendra Singh, the learned AGA for the State and perused the record.
2. By means of the instant application filed under Section 482 Cr.P.C., the applicants have prayed for quashing of the order dated 21.02.2024 passed by the learned Additional Session Judge, Court No. 4, Hardoi in Misc. Case No. 448 of 2021 in Session Trial No. 582 of 2009, summoning the applicants to face trial of the offence alleged in F.I.R. No. 523 of 2009 under Sections 147, 148, 302/149 IPC, Police Station Bilgram, District Hardoi.
3. Briefly stated, facts of the case are that on 14.04.2009 one Waris (father of the opposite party no. 2) had lodged F.I.R. No. 523 of 2009 under Sections 147, 148, 302/149 IPC, in Police Station Bilgram, District Hardoi against 5 persons, including the applicants, stating that when the complainant was going to his fields at about 02:15 p.m. with his brother Arif, the accused persons met them on the way and on the exhortation of the applicants and one Irfan alias Munna, the other accused persons Irshad and Abdul Aziz fired shots by pistols. The complainant's brother got injured and he fell down on the spot. Upon hearing the gun-shot and the cries of the complainant, Zaheer Khan and Jaipal reached on the spot and challenged the accused persons whereupon they ran away.

4. After investigation, a charge-sheet was submitted on 14.07.2009 against Irshad and Irfan for offences under Sections 147, 148, 149 and 302 IPC and the investigation against the applicants remained pending. The trial Court took cognizance of the offences and summoned Irshad and Irfan to face the trial.
5. An application under Section 319 Cr.P.C. was filed for summoning the other named accused persons also, but it was rejected by means of an order dated 29.01.2010 for the reason that the witnesses PW-1 and PW-2 were yet to be cross-examined.
6. The complainant challenged the order dated 29.01.2010 by filing Criminal Revision No. 203 of 2010 and this Court disposed off the revision by means of an order dated 14.05.2010 by observing that the prayer for summoning the accused persons be considered after the cross-examination of the witnesses was over.
7. After cross-examination of PW-1 and PW-2, the complainant again filed an application for summoning the rest of the accused persons under section 319 Cr.P.C., but this too was rejected by means of an order dated 19.07.2010. The complainant filed Criminal Revision No. 400 of 2010, challenging the order dated 19.07.2010.
8. During pendency of Criminal Revision No. 400 of 2010 before this Court, the trial was concluded by the judgment and order dated 19.10.2011 wherein it was held that the accused persons Irshad and Irfan created an unlawful assembly with the other accused persons and they killed the deceased Arif by shooting at him with a firearm. The accused persons Irshad and Irfan were convicted for offences under Sections 147, 148, 302/149 I.P.C. and they were acquitted of rest of the charges by means of a judgment and order dated 19.10.2011 passed by the trial Court. They were sentenced to undergo rigorous imprisonment for a period of one year for the offence under Section 147 I.P.C., two years for the offence under Section 148 I.P.C. and life imprisonment and payment of Rs.5,000/- fine for the offence under Section 302/149 I.P.C. and to undergo imprisonment for six months in case of failure to pay fine.

9. Irshad and Irfan filed Criminal Appeal No. 1886 of 2011 challenging the aforesaid judgment and order of conviction and sentence, which is still pending.
10. Criminal Revision No. 400 of 2010 was allowed by means of a judgment and order dated 14.09.2021 passed by this Court whereby the order dated 19.07.2010 was set aside and the application was directed to be decided afresh. On 22.09.2021, the complainant again filed an application under Section 319 Cr.P.C. in compliance of the order dated 14.09.2021 passed by this Court in Criminal Revision No. 200 of 2021. This application was allowed by means of the impugned order dated 21.02.2024.
11. The trial Court has held in the impugned order dated 21.02.2024 that the prosecution witnesses have stated that the incident was given effect to by the convicted persons along with the applicants and Abdul Aziz under a common intention. Abdul Aziz has died. A prima facie case was made out against the applicants for their trial.
12. Challenging validity of the aforesaid order summoning the applicants under Section 319 Cr.P.C., the learned Counsel for the applicants has submitted that the trial Court can summon any person under section 319 Cr.P.C. only during pendency of the trial whereas in the present case, the trial stood concluded long before passing of the order under Section 319 Cr.P.C. and, therefore, the order is without jurisdiction. In support of this submission, the learned Counsel for the applicant has placed reliance upon a judgment of the Hon'ble Supreme Court in **Sukhpal Singh Khaira v. State of Punjab**, (2023) 1 SCC 289, wherein it was held that: -

“39.(I) Whether the trial court has the power under Section 319CrPC for summoning additional accused when the trial with respect to other co-accused has ended and the judgment of conviction rendered on the same date before pronouncing the summoning order?”

The power under Section 319 CrPC is to be invoked and exercised before the pronouncement of the order of sentence where there is a judgment of conviction of the accused. In the case of acquittal, the power should be exercised before the order of acquittal is pronounced. Hence, the summoning order has to precede the conclusion of trial by imposition of sentence in the case of conviction. If the order is passed on the same day, it will

have to be examined on the facts and circumstances of each case and if such summoning order is passed either after the order of acquittal or imposing sentence in the case of conviction, the same will not be sustainable.

40.(II) *Whether the trial court has the power under Section 319 CrPC for summoning additional accused when the trial in respect of certain other absconding accused (whose presence is subsequently secured) is ongoing/pending, having been bifurcated from the main trial?*

The trial court has the power to summon additional accused when the trial is proceeded in respect of the absconding accused after securing his presence, subject to the evidence recorded in the split-up (bifurcated) trial pointing to the involvement of the accused sought to be summoned. But the evidence recorded in the main concluded trial cannot be the basis of the summoning order if such power has not been exercised in the main trial till its conclusion.

41.(III) *What are the guidelines that the competent court must follow while exercising power under Section 319 CrPC?*

41.1. *If the competent court finds evidence or if application under Section 319 CrPC is filed regarding involvement of any other person in committing the offence based on evidence recorded at any stage in the trial before passing of the order on acquittal or sentence, it shall pause the trial at that stage.*

41.2. *The court shall thereupon first decide the need or otherwise to summon the additional accused and pass orders thereon.*

41.3. *If the decision of the court is to exercise the power under Section 319 CrPC and summon the accused, such summoning order shall be passed before proceeding further with the trial in the main case.*

41.4. *If the summoning order of additional accused is passed, depending on the stage at which it is passed, the court shall also apply its mind to the fact as to whether such summoned accused is to be tried along with the other accused or separately.*

41.5. *If the decision is for joint trial, the fresh trial shall be commenced only after securing the presence of the summoned accused.*

41.6. *If the decision is that the summoned accused can be tried separately, on such order being made, there will be no impediment for the court to continue and conclude the trial against the accused who were being proceeded with.*

41.7. *If the proceeding paused as in para 41.1 above, is in a case where the accused who were tried are to be acquitted, and the decision is that the summoned accused can be tried afresh separately, there will be no impediment to pass the judgment of acquittal in the main case.*

41.8. *If the power is not invoked or exercised in the main trial till its conclusion and if there is a split-up (bifurcated) case, the power under Section 319 CrPC can be invoked or exercised only if there is evidence to that effect, pointing to the involvement of*

the additional accused to be summoned in the split-up (bifurcated) trial.

41.9. If, after arguments are heard and the case is reserved for judgment the occasion arises for the Court to invoke and exercise the power under Section 319CrPC, the appropriate course for the court is to set it down for re-hearing.

41.10. On setting it down for re-hearing, the above laid down procedure to decide about summoning; holding of joint trial or otherwise shall be decided and proceeded with accordingly.

41.11. Even in such a case, at that stage, if the decision is to summon additional accused and hold a joint trial the trial shall be conducted afresh and de novo proceedings be held.

41.12. If, in that circumstance, the decision is to hold a separate trial in case of the summoned accused as indicated earlier:

(a) The main case may be decided by pronouncing the conviction and sentence and then proceed afresh against summoned accused.

(b) In the case of acquittal the order shall be passed to that effect in the main case and then proceed afresh against summoned accused.”

13. Before proceeding any further, it would be appropriate to have a look at the statutory provision contained in Section 319 Cr.P.C., which reads as follows: -

“319. Power to proceed against other persons appearing to be guilty of offence.—(1) *Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.*

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under subsection (1) then—

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.”

14. The limitations put by the words “*in the course of any inquiry into, or trial of, an offence*” used in Section 319 Cr.P.C. and explained in **Sukhpar Singh Khaira** (Supra), are in respect of the powers of the trial Court to summon an accused person under this power.
15. In the present case, the applicants were named in the F.I.R. and it was alleged that when the complainant was going to his fields with his brother, on the exhortation of the applicants, the other accused persons Irshad and Abdul Aziz had killed the complainant’s brother by firing shots with pistols. The investigating officer had submitted a charge-sheet against Irshad and Irfan on 14.07.2009 and the investigation remained pending against the applicant and it was never concluded. The complainant had filed an application under Section 319 Cr.P.C. for summoning the applicants during pendency of the trial, after recording of examination-in-chief of prosecution witnesses PW-1 and PW-2, but it was rejected on 29.01.2010 for the reason that the witnesses were yet to be cross-examined. After cross-examination of PW-1 and PW-2, the complainant again filed an application for summoning the rest of the accused persons under section 319 Cr.P.C., but this too was rejected by means of an order dated 19.07.2010. The complainant filed Criminal Revision No. 400 of 2010, challenging the order dated 19.07.2010.
16. During pendency of Criminal Revision No. 400 of 2010 before this Court, the trial was concluded by the judgment and order dated 19.10.2011 wherein it was held that the accused persons Irshad and Irfan created an unlawful assembly with the other accused persons and they killed the deceased Arif by shooting at him with a firearm. The accused persons Irshad and Irfan were convicted and sentenced for offences under Sections 147, 148, 302/149 I.P.C. and they were acquitted of rest of the charges by means of a judgment and order dated 19.10.2011 passed by the trial Court.
17. It appears that the fact of pendency of Criminal Revision No. 400 of 2010 was not brought to the notice of the trial Court.

18. Irshad and Irfan filed Criminal Appeal No. 1886 of 2011 challenging the aforesaid judgment and order of conviction and sentence, which is still pending.
19. Criminal Revision No. 400 of 2010 was allowed by means of a judgment and order dated 14.09.2021 passed by this Court whereby the order dated 19.07.2010 was set aside and the application was directed to be decided afresh. Although the applicant was represented through an Advocate in Criminal Revision No. 400 of 2010, it appears that the applicant's Counsel did not appear to assist the Court at the time of decision of the revision and the fact of the trial having been concluded and the accused persons having been convicted and sentenced, was not brought to the notice of this Court while it was deciding the revision.
20. It is in compliance of the order dated 14.09.2021 passed by this Court in exercise of its revisional jurisdiction, that the trial Court has passed the impugned order deciding the application under Section 319 Cr.P.C.
21. The power of revision is conferred by Section 319 Cr.P.C. which reads thus: -

“397. Calling for records to exercise of powers of revision.—(1)
The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation.—All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of Section 398.

(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no

further application by the same person shall be entertained by the other of them.”

22. In **Krishnan v. Krishnaveni**, (1997) 4 SCC 241, the Hon’ble Supreme Court explained the scope of revisional powers of this Court in the following words: -

*“7... Ordinarily, in the matter of exercise of power of revision by any High Court, Section 397 and Section 401 are required to be read together. Section 397 gives powers to the High Court to call for the records as also suo motu power under Section 401 to exercise the revisional power on the grounds mentioned therein, i.e., to examine the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior court, and to dispose of the revision in the manner indicated under Section 401 of the Code. **The revisional power of the High Court merely conserves the power of the High Court to see that justice is done in accordance with the recognised rules of criminal jurisprudence and that its subordinate courts do not exceed the jurisdiction or abuse the power vested in them under the Code or to prevent abuse of the process of the inferior criminal courts or to prevent miscarriage of justice.**”*

23. The ultimate aim of every investigation and inquiry, whether by the police or by the Magistrate, is to ensure that the actual perpetrators of the crime are correctly booked and the innocents are not arraigned to stand trial. If the police does not conclude investigation against some of the accused persons and the trial Court also does not summon the accused persons after enquiry or during trial and it wrongly rejects an application under Section 319 Cr.P.C., there are no limitations on the powers of this Court under Section 397/401 Cr.P.C. to revise and reverse an order passed rejecting an application under Section 319 Cr.P.C. merely because the trial against the originally summoned accused persons stood concluded during pendency of the revision and has resulted in conviction and sentence of those accused persons, more particularly when the trial Court has recorded that incident was given effect to at the exhortation of the persons sought to be summoned under Section 319 Cr.P.C.
24. Section 319 (4) Cr.P.C. provides that where the Court proceeds against any person under sub-section (1) of Section 319 then the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard. Therefore, the conclusion of trial against the

other accused persons, who had been summoned originally, does not cause any prejudice to the applicant, as the trial against the applicants would be held afresh and they will have the right to defend themselves in accordance with the law.

25. Therefore, keeping in view the peculiar facts and circumstances of the case, I am of the considered view that the impugned order dated 21.02.2024 does not stand vitiated merely because the trial against the other accused persons stands concluded.
26. The learned Counsel for the applicant next submitted that a person cannot be summoned under Section 319 Cr.P.C. on the basis of a mere probability of complicity and the crucial test is that the evidence would lead to his conviction if it goes unrebutted. In support of this contention, he has placed reliance on the Constitution Bench judgment in the case of **Hardeep Singh v. State of Punjab**, (2014) 3 SCC 92, wherein it was held that: -

“117.5. Though under Section 319(4)(b) CrPC the accused subsequently impleaded is to be treated as if he had been an accused when the court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 CrPC would be the same as for framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.”

27. In the present case, the witnesses PW-1 and PW-2 have stated about that the previously tried accused had shot at the victim at the exhortation of the applicant. The trial stands concluded by the judgment and order dated 19.10.2011 wherein it was held that the accused persons Irshad and Irfan created an unlawful assembly with the other accused persons and they killed the deceased Arif by shooting at him with a firearm. In case the aforesaid evidence remains unrebutted, the same would lead to conviction of the applicant.
28. Therefore, there is no illegality in the order summoning the applicant under Section 319 Cr.P.C.

29. Section 482 Cr.P.C. saves the inherent powers of the High Court to make such orders as may be necessary to secure the ends of justice. Non-summoning of accused persons against whom there was ample evidence warranting their trial, would defeat the ends of justice. The order rejecting the application under Section 319 Cr.P.C. was set aside by this Court in exercise of its revisional jurisdiction and it is only thereafter, that the trial Court has summoned the applicants under Section 319 Cr.P.C. Any interference with the order summoning the applicants to face trial would in fact defeat the ends of justice, which would be contrary to the object for which the inherent powers of this Court are meant to be exercised.
30. In view of the foregoing discussion, the application filed under Section 482 Cr.P.C. lacks merit and the same is hereby *dismissed*.

(Subhash Vidyarthi J)

Order Date : 01.04.2024

Pradeep/-